INDEX TO REPLY BRIEF.

TABLE OF CITATIONS.

IN THE

Supreme Court of the United States.

No. 647. October Term, 1947.

SERGE M. RUBINSTEIN, ALSO KNOWN AS SERGE MANUEL RUBINSTEIN DE ROVELLO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

No. 648. October Term, 1947.

ALLEN GORDON FOSTER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY BRIEF.

1. As to Whether It Was a Criminal Offense to Make False Statements to Secure a Deferment.

The Government does not dispute that the word "liability" in every other section of the Selective Training and Service Act has a meaning different from that which it ascribes to the word as used in Section 11, the criminal section of the Act. To justify this arbitrary position, it is said regarding non-liability and deferment (p. 17): "And it is unreasonable to believe that Congress did not intend to extend the enforcement provisions to this category as well as the other."

However, *Congress said differently.* If regard is not to be had to its language, any conclusion is purely conjectural. And this Court, considering the same reasoning applied to another federal statute, just recently has answered this contention by stating that such an argument

is not to be addressed to this Court, but to Congress. See *United States v. Paul Evans,* No. 15, October Term, 1947, decided on March 15, 1948.

Peskoe v. United States, No. 874, October Term, 1946, 330 U. S. 824, cited by the Government, has no application here. It was a case where a false statement was made as to "liability" as the word is used in Section 11. This is perfectly clear as pointed out in petitioners' briefs (Rubinstein p. 17, Foster p. 15).

The Government's position rests upon the assumption of an untenable major premise that "exemption" is the same as "non-liability" or "relieved from liability." From this it argues that deferment is simply a partial exemption since both exemption and deferment may be granted by a draft board upon cause shown. Even if that were so it does not follow that deferment is the same as non-liability. The Act throughout makes a distinction between non-liability and exemption and permits the local boards to select only "from the men who are liable for such training and service and who at the time of selection are registered and classified but not deferred or exempted." Section 4, 50 U. S. C. A. App. § 304 (a). See also, Section 5 (a) (m), 50 U. S. C. A. App. § 305 (a) (m). See also, Petitioner Rubinstein's Brief, footnotes 2, 3 and 4, pp. 12-15.

The Government says (pp. 16-17):

> "In contrast to the exempt status, a deferred classification meant that the registrant was not then liable for selection for service, but that at any time in the future, if his situation changed or if the regulations establishing deferred categories were amended, his classification might then be changed to I-A, and he would then become liable for selection for military service. The sole difference between an exemption and a deferment was the difference between being totally relieved of service and being relieved on condition subsequent."

This is fallacious and misleading. One who was deferred remained liable nevertheless; he did not, if his deferment were rescinded, subsequently become liable or bcome liable "on condition subsequent". The Government apparently uses the phrase "liable for selection" as synonymous with "liable for service", but they are clearly different concepts. Selection and liability are not the same and Section 11 applies only to the latter. One who was "liable for service" may or may not have been "liable for selection", in the sense the Government misuses that phrase. A registrant granted deferment could not be *selected* for service during the period of his deferment, but at all times remained *liable for service.*

It is the Government which speaks of "liable for selection"; the statute does not.

2. As to Whether the Statements of Opinion Alleged to Be False in Counts 2 and 3 Are "False Statements" Within the Meaning of the Act.

As stated in the Government's brief, the second question is as follows (p. 2):

> "Whether deliberately false statements as to the importance of a registrant to a business fail to come within the purview of Section 11 because they involve matters of opinion."

This statement indicates that what was alleged to be false in the indictment was a statement both of fact and of opinion and that the question really is whether merely by adding a statement of opinion to a statement of fact a defendant can insulate himself against criminal prosecution for the false statement of fact.

But this is not the issue. Although Form 42-A did contain statements of fact it was *not those statements* which were alleged to be false, but *only the other statements of opinion.*

The Government points out (p. 19):

> "The statement that, 'because of the character' of Rubinstein's functions, the success of the business depended upon his continuing employment, obviously referred to the statement of duties set forth in the prior portion of the affidavit (see Statement, *supra*, p. 6). These were clearly false statements of fact as to the 'character' of Rubinstein's functions which were carried over into the statement alleged in the indictment."

The Government discreetly ignores, however, the fact that although the indictment recites that Form 42-A containing Foster's opinion as to Rubinstein's future importance was made "because of the character of Serge M. Rubinstein's functions", the indictment goes on to charge only that the opinion was false. *The indictment does not charge that the statements as to the character of his functions were false.*

In its brief, the Government states (p. 20): "No conflict of decisions is here involved." In this it differs from the court below which said there is, citing *Chaplin v. United States*, 157 F. 2d 697 (App. D. C.). The court below again said just the other day that its views as to the criminality of opinions, even as to the future, are irreconcilable with the *Chaplin* case. In *United States v. Grayson*, No. 136, October Term, 1947, C. C. A. 2nd, decided March 4, 1948, the court said:

> "It is true that in *Chaplin v. United States* the Court of Appeals for the District of Columbia by a divided court felt bound to hold otherwise in a prosecution for obtaining money under false pretenses. We have recently refused to follow this ruling in a prosecution for evading the Selective Service Act [this case]; and certainly it has never applied to the statute for fraudulent use of the mails."

The Government further states, in arguing that statements of opinion may be "false statements", that this has

been so held "even in the civil law of fraud" (p. 20). It would seem that the Government is here advocating the novel proposition that it requires less to prove fraud in a criminal case than in a civil case. And, in support of its position that there is no conflict on this issue, the Government cites civil cases from Circuit Courts *other than those from which criminal cases* were cited by petitioners, indicating that the conflict is wider even than petitioners pointed out.

3. As to the Refusal of the Request to Instruct the Jury on the Use of Evidence Admissible for a Limited Purpose.

The Government states this issue as follows (p. 2):

> "Whether, after instructing the jury as to the nature of the offense charged in the indictment, the judge was required to give instructions to the jury not to base its verdict on other evidence."

This is a literal statement of the question but it does not fairly pose the problem. The Government's brief emphasizes the importance of the evidence as to the percentage of war work (p. 11) showing that it relies even now upon such evidence to support the conviction. The problem, therefore, is really not whether petitioners could have required the trial judge to give negative instructions, but rather whether he should have stated, when requested, that evidence admissible for a limited purpose could be considered by the jury only for such purpose.

The evidence of percentage of war work was admissible on the question of intent, as the court below quite properly held. Once the jury found that these particular statements were false, it could use such finding to infer, not that the statements charged in the indictment to be false were in fact false, but only that if such statements were false they were made with knowledge of their falsity. The jury could not convict the petitioners if they found the "war work" statements *alone* to be false.

The trial judge refused so to instruct the jury, which was left completely in the dark on this important point. This refusal left the way open for petitioners' conviction upon an invalid ground.

4. As to Whether Petitioner Rubinstein Can Be Convicted of Conspiracy Since Concert of Action Was Required to Commit the Substantive Offense.

The Government says (p. 24):

> "Concert of action is not an element of the offense of making false statements as to liability for service under the Selective Training and Service Act. The employer, alone, could make false statements. A registrant, alone, could under some circumstances, cause an innocent employer to make a false statement."

Petitioner has suggested that in resolving this question the statute alone should not be determinative. The law should require at the very least that the offense *as charged in the indictment* must be considered, and really ought to require that the theory of the government's case *as disclosed by the evidence* must be considered.

While the Government states that "A registrant, alone, could under some circumstances, cause an innocent employer to make a false statement", in the instant case the *indictment* charged a statement in an *employer's* questionnaire to have been falsely made *by an employee and an employer*, and the *evidence* discloses the questionnaire to have been signed by the *employer*. This substantive offense as charged could not have been committed without cooperative action.

Respectfully submitted,

LEMUEL B. SCHOFIELD,
Attorney for Petitioner Rubinstein.

THOMAS D. MCBRIDE,
Attorney for Petitioner Foster.